Victim Participation In Criminal Justice

Andrew Sanders explains how victims are still excluded from decision making.

'Lay participation' in criminal justice means institutions like JPs and juries for most of us. But you don't need to create lay institutions to ensure lay participation, for in most criminal disputes it is in-built. There are defendants and, usually, victims. But should victims participate in 'their' cases? And if so, in what ways?

Victims lost...

In adversary systems such as in the UK, there are simply two sides: prosecution and defence. Before the introduction of professional police forces, investigation and prosecution was usually the responsibility of the victim. Although prosecutions were rare, usually being possible only for wealthy victims, at least these arrangements ensured that victims were in control of their cases.

In the mid-late 19th century, professional police forces took over investigation and prosecution. This separated victims from the courts and from 'their' cases. In the mid-1980s the Crown Prosecution Service (CPS), took responsibility for prosecuting police cases, introducing another bureaucracy between victims and the courts. The only side in which victims can participate is the prosecution, but the interests of the prosecution are not always those of victims. For example, the prosecution may wish to save time and money, and ensure conviction, by accepting a guilty plea to relatively minor charges (e.g. theft instead of robbery; indecent assault instead of rape).

For many years victims were the forgotten actors in the criminal justice system. Neither the police nor the prosecution had any great interest in ascertaining the views, interests, or facts about the victim except in relation to the sort of evidence that is admissible in court — this frequently excludes much of what is relevant to lay people. It also meant that other useful, albeit not admissible, information was frequently not collected – e.g. information relevant in deciding whether to accept guilty pleas to lesser charges, or information which might affect sentence. Communication from victims to courts, and from courts to victims, was obstructed, leaving victims ignorant about what was happening in 'their' cases. Traditionally, victims were simply citizens who might or might not be used as witnesses — a decision wholly for the prosecution.

... and re-discovered

Most people now agree that the criminal justice system was wrong to neglect victims. Victim pressure groups and NGOs have become influential. Victim Support now receives millions of pounds of government funding. The government has pledged to put victims 'at the heart of the criminal justice system'. The official criminal justice system web-site proclaimed as one of the three aims of the July 2002 White Paper the 'rebalancing the criminal justice system in favour of the victim'. There are even UN, Council of Europe and EU directives requiring member states to reverse policies that neglect the sensibilities and interests of victims. And victims' rights are increasingly being recognised under the ECHR and *Human Rights Act*.

Under the *Victims' Charter* (first published in 1990, the third edition is now in preparation), the formal position of victims remains unchanged: they are not parties to proceedings and they have no enforceable rights. But the Charter has changed the administrative response of the criminal justice system to victims, thus satisfying our international legal obligations. In particular:

Victims may make 'impact' statements (now called 'personal' statements), for the information (where applicable) of prosecutors, courts and the Parole Board. The police and CPS should ascertain the views and interests of victims, and 'take them into account' in making decisions. Victims of serious violence and sexual offences, where the offender is imprisoned, are informed of possible release dates and may make representations. A Witness Service supports witnesses (mostly victims) due to give evidence, and separate waiting areas are increasingly being provided for defence and prosecution witnesses. Victims are kept informed about the progress of their cases if they so wish. Special assistance is given to children and to other vulnerable and intimidated witnesses, including the victims of domestic and sexual violence.

All these measures encourage victims and lay witnesses to participate in some sense. This is important, for the police and prosecution rely hugely on members of the public to give evidence, yet a recent survey indicated that most witnesses who give evidence in court would be reluctant to do so again because the experience was dispiriting and/or intimidating. However, I shall now focus on victim impact statements (VIS). For VIS allows participation in decision making, raising wider questions about what a lot of victim policy is really about.

Victim impact statements

In the late 1990s my colleagues and I carried out two evaluations of pilot VIS projects in several different police force areas. The first gauged the satisfaction of victims at the start of their cases and at the end. 77% of participants were pleased at the start of their cases that they participated (only 2% being displeased, the rest being neutral or not having a clear view), but only 57% were pleased by the end, and 20% were displeased (Hoyle *et al*, 1998).

Some victims did not say all that they had wanted to say, and for others the situation had changed after making their statements. The main reason for dissatisfaction was that many victims thought that their statements had been ignored.

The second evaluation examined the use of VIS by prosecutors and courts. Although it seems that few had actually been ignored, equally few had made any difference to prosecution decisions or to sentence.

Some victims expected their VIS to make a conviction more likely. This shows that many victims do not understand the system, and the process of eliciting VIS does nothing to help. Even where VIS could make a difference in theory (largely in sentencing) they virtually never did in reality. This was because when victims told judges what they expected to hear they told judges nothing new, and unexpected things had to be 'taken with a pinch of salt' in the absence of supporting evidence (Morgan and Sanders 1999). Similar results have been found in, for example, the USA and Australia (Sebba 1996).

The evaluation of VIS in relation to long-term prisoners by Crawford and Enterkin showed similarly raised, but unfulfilled, expectations, although Crawford and Enterkin found higher levels of satisfaction than did Hoyle *et al.* Again, much of what victims say, or want to say, is deemed irrelevant. As one victim-liaison officer put it, "When I come back [from interviewing a victim] I have a barrel full of concerns which are then sifted through and it becomes a thimble" (Crawford and Enterkin, 1999). Victims were upset that the reports appeared to be ignored and about the absence of feed-back.

So what purposes are served by these measures? I argue more fully elsewhere that these are exclusionary. (Sanders 2002). VIS and its variants are probably more popular with people who have never used them than with those who have. VIS provides solace for people who feel they could be the next victim. As potential victims outnumber real victims, this is a good vote-winner even if dissatisfaction with these schemes is blamed on the officials who design and implement them. VIS are good for idealised victims, rather than real victims. Further, most 'victim policy', including VIS, actually encompasses relatively few victims. Victims of white collar crime – pollution, fraud, factory and building site accidents and so forth – are literally excluded. Victim policy as it is currently unfolding thus serves to accentuate the 'us' and 'them' of the popular media and populist politician, for this policy does not define white collar criminals as 'real' criminals. This contributes to what David Garland calls policies of 'punitive segregation', for it leads us to see criminals as 'Other' (Garland 2001).

If government really wants to meet the needs of victims it should encourage forms of participation that do not raise expectations only to dash them, but which help victims to understand the aims and processes of criminal justice. As with restorative justice and many inquisitorial systems, victims should be allowed to see prosecution papers, ask questions of prosecutors and courts, and seek information. Officials would be obliged to explain to victims what is, and what is not relevant. The same approach could be adopted in parole hearings, which are currently closed to victims. The current narrow populist definition of 'victim' should be broadened. Genuinely participative approaches have the potential to reduce the gap between victims and offenders, encourage a less authoritarian climate and promote a more inclusionary society. This is the government's declared aim. Has it the courage to implement it? ■

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We commented in our reports that if VIS are to be continued, the Victims Charter should be amended to make it clear that information from victims will not normally be taken into account by decision makers. Not surprisingly, when the Government decided to introduce a modified VIS ('Personal Statement Scheme') in 2000, they did not say this. Confronted on TV with our findings that Victim Impact Statements are bad for many victims, the responsible government minister repeated the mantra that 'this is what victims want', deliberately ignoring the point that many wanted VIS only before they were made and then ignored.

Similarly, in the landmark case of Thompson and Venables (the murder of the toddler, James Bulger) the Lord Chief Justice had to decide whether a murder tariff should be the eight years set by the trial judge or the fifteen years set by the Home Secretary. The Lord Chief Justice stated: 'I have found it of real value to have information as to the impact of the death on the family ...' He went on to summarise the traumatic effects of James Bulger's death. However, it is hard to see what value it could have had, as the Lord Chief Justice deliberately set the prisoners' tariffs as low as possible, to enable their cases to be considered for release by the Parole Board immediately. In giving victims a voice, but not the dignity that attaches to being heard, the UK adheres to the letter but not to the spirit of our international obligations.

Whose interests are served by victim participation?

I have shown that, until recently, victims were wrongly ignored by most criminal justice agencies. However, government initiatives aimed at encouraging participation (especially VIS) are not the answer. This is largely because they involve very little participation. If making a witness statement and then being ignored is insulting, making two statements but still being ignored is hardly empowering.

***Andrew Sanders** is Professor of Criminal Law and Criminology, University of Manchester.*

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